

His Grace John Duke of Roxburgh,

APPELLANT.

Christian Kerr Lady Chatto, and Charles Kerr, Esq; }
her Husband, } RESPONDENTS.

THE RESPONDENTS CASE.

13 Feb. 1647.

ROBERT Earl of Roxburgh (after the Decease of his only Son Harry Lord Kerr without Issue Male) by Deed of Entail settled all his real Estate (which was subject to the Debts of the said Lord Kerr) upon Sir William Drummond, youngest Son of the Earl of Perth, on Condition he should marry Jane the Eldest Daughter of the said Lord Kerr, and upon the Issue Male of that Marriage, with divers Remainders over, under several prohibitory and irritant Clauses; particularly, That if any of the Heirs of Entail should sell or alienate any Part of the Estate, whereby the same should be evicted or carried off, such Heir of Entail, and the Issue of his Body, should forfeit all Right and Title to the Estate, and the same should descend to and devolve upon the next Heir in Remainder — But subject to a Proviso or Power to the several Heirs of Entail, to Charge and Burthen the Estate with whatsoever Debts he the said Earl Robert should owe at the Time of his Death — The Words in the Settlement giving this Power are these: *Nec non Reservando Potestatem ante dictis Heredibus dictum Statum & Patrimonium cum quibuscunque Summis Monetæ vel Debitis Debendis per prefatum Robertum Comitem de Roxburgh tempore sui Decessus, quæ per ejus Bona Mobilia, non solvantur modo Prescripto per illum in Novissima ejus Voluntate, ONERANDI.*

1650

EARL Robert died about the Year 1650; whereupon the said Sir William Drummond intermarrying with Jane, Lord Kerr's eldest Daughter, agreeable to the said Deed of Entail, succeeded to the said Estate and Earldom of Roxburgh, and from the Issue of that Marriage the Appellant is lineally descended.

THE Debts of the said Earl Robert were so considerable, that he was scarce able in his Life Time, even with the Assistance of his Friends, to keep his Creditors from bringing Actions for the Recovery of their respective Debts; amongst those Friends Andrew Kerr of Chatto (Ancestor of the Respondent Christian) was the most active, and contributed greatly to the Preservation of the Estate, having stood bound as Surety at one Time for Debts of the said Earl Robert in no less a Sum than 160,000 Marks — But when Earl William came to the Possession of the said Estate, the Creditors pressing for Payment of their Debts, there was a Necessity of pursuing the Power given by the said Deed of Entail to charge the Estate with these Debts; and accordingly

1655

Executed
by E. William.
March 28 by
John Scott.

BY a PROPER WADSETT or Indenture of Mortgage of this Date made between the said William Earl of Roxburgh, and John Scott of Langshaw, one of Earl Robert's Creditors, Reciting two Bonds, one dated the 3d of June 1642, from Earl Robert and Harry Lord Kerr his Son as Principals, and the aforesaid Andrew Kerr and others as Sureties, to William Murray of Langsharmistoun for 15,000 Marks; the other Bond dated the last Day of February 1644, from the said Earl Robert as Principal, and the said Andrew Kerr and others as Sureties, to Sir William Scott of Clarkingtoun for 7000 Marks; and that the said two Bonds were assigned to the said John Scott, and that the said two principal Sums making together 22,000 Marks, were justly due and owing — And also reciting, That the said Earl William was willing the same should be further secured agreeable to the Power reserved to him by the said Settlement. — The said Earl William, in Corroboration of the said Bonds and Assignments thereof, Wadsetted and conveyed in Mortgage to the said John Scott, his Heirs and Assigns, the Lands of Ormiston and other Lands, Subject to a Proviso of Redemption on Payment of the said 22,000 Marks, as therein mentioned — And Livery of Seizin of the said mortgaged Premises was afterwards made to the said John Scott.

N. B. By the Nature of these Rights in Scotland, called Proper Wadsetts, the Mortgagee is put into the immediate Possession of the Premises, and takes the Rents and Profits thereof, whether more or less, in Lieu and Satisfaction of Interest, without being subject to any Account.

April 1655.

THE said John Scott assigned the said Proper Wadsett unto William Kerr, then an Infant, Son of the said Andrew Kerr of Chatto.

Sept. 1658.

BY another PROPER WADSETT, or Indenture of Mortgage of this Date, made between the said William Earl of Roxburgh and the said Andrew Kerr, for himself and in the Name of his said Infant Son William Kerr, Reciting, That the said Andrew Kerr was intitled to the several Sums therein particularly mentioned, and the Securities for the same, amounting to 26,500 Marks, due from the said Earl Robert at his Death: And that the said Earl William was not in a Condition to pay off the same, but by the Wadsett of the Lands after mentioned — The said Earl William, as a further Security for the said Debts, conveyed the Lands of Cuthbertshope, together with other Lands therein mentioned, to the said Andrew Kerr for Life, with Remainder to the said William Kerr his Son in Fee — Subject to a Proviso of Redemption on Payment of the said 26,500 Marks at Whitsunday 1671, or at any Time after on sixty Days Premonition —

Sept. 1658.

BY a Contract in Writing (called a Bond of Eke) of this Date, made between the said William Earl of Roxburgh, and the said Andrew Kerr, for himself and his said Infant Son William Kerr — Reciting the said two Wadsetts or Mortgages; and also that the said Andrew Kerr stood bound as Surety for Debts of Earl Robert to the several Persons in the said Deed named, in the several Sums therein particularly mentioned, amounting to 22,500 Marks: And further Reciting, That the said Andrew Kerr, by Bond dated the 4th of January 1654, entered into by him and the said Earl William to Sir William Scott of Clarkingtoun, stood bound as Surety for the said Earl William in 5000 Marks, which was borrowed to pay 3000 Marks due to Sir Alexander Carnegie by a Bond from the said Harry Lord Kerr dated the 7th of September 1641, and 2000 Marks due to George Murray by a Bond from the said Lord Kerr dated the last Day of November 1638, which two Bonds were assigned to the said Andrew Kerr, for his Relief of the said 5000 Marks borrowed from the said Sir William Scott: And also Reciting, That the said Andrew Kerr being willing to undertake the Payment of the said Principal Sums, amounting to 27,500 Marks, with Interest from Whitsunday 1658, upon Condition that the same should be repaid to him and his said Son, with Interest in Time coming, in Manner therein mentioned, or else should be Eiked and added to the Reversions of the said Wadsett Lands — The said Andrew Kerr covenanted to procure from the said several Persons sufficient Assignations of the said Bonds in favours of himself in Life-Rent, and his Son in Fee, against Whitsunday 1660; and to Relieve and Indemnify the said Earl William from all Payment of the said Principal Sums and Interest from Whitsunday 1658, and also to procure a Discharge to the said Earl William of the said Bond of 5000 Marks entered into by him and the said Andrew Kerr to the said Sir William Scott as aforesaid — In Consideration whereof, the said Earl William covenanted to pay the said Andrew Kerr, or William Kerr his Son, the said 27,500 Marks at Whitsunday 1659, with Interest from Whitsunday 1658, — And for their further Security Eiked or charged the Lands included in both the said Wadsetts, and the Reversion and Equity of Redemption, with the Payment thereof accordingly — And by the said Deed the said Andrew Kerr released all Manner of Execution, Personal or Real, for Payment of the said 27,500 Marks, other than by Apprising the said Lands contained in the said two Wadsetts.

THE said *Andrew Kerr*, pursuant to his said Covenant, paid the said 27,500 Marks to the several Persons to whom the same were due, and procured a *Discharge* to *Earl William* of his said Bond of 5000 Marks, and soon afterwards dyed, leaving the said *William Kerr* his Son an Infant, who in 1665 obtained a Charter from the Crown of the Lands contained in both the aforesaid Wadsetts, and Livery of Seisin was afterwards made to them thereon.

THE Payment of these Debts prevented a Multiplicity of expensive Suits against the said *Earl William*, which, if brought, would have carried off great Part of the Entailed Estate.

20 March 1665. THE said *Earl William* not having paid any Part of the said 27,500 Marks, or Interest, the Curators of the said *William Kerr*, during his Minority, obtained a Decree of Apprising or Adjudication of the Premises contained in the said two Wadsetts, for Payment of the Monies due according to the said Bond of *Eik*. — By virtue of which Decree of Apprising, the Equity of Redemption of the said Lands became absolutely foreclosed, if the Money was not paid within ten Years next after the Date of the said Apprising, which Term is called the *Legal*.

THAT the Money not being paid within the said Term or *Legal*, the absolute Property of the said Lands (by the Law of Scotland) became vested Irredeemably in the said *William Kerr* and his Heirs, and accordingly he and those claiming under him have ever since (which is about seventy Years) continued in the quiet and uninterrupted Possession of the said Lands, as the absolute Owners thereof; and in Consideration of the undoubted Security of this Title, great Part of the said Estates had been sold, and other Part thereof mortgaged for considerable Sums of Money, which (were the same to be unravelled and impeached at this Distance of Time) would occasion great Confusion and Mischief to those that enjoy such Estates, who were fair Purchasers for valuable Considerations, or derive and possess the same from and under such.

1708. THE said *William Kerr*, settled the Lands included in both the said Wadsetts, together with his other Lands in such Manner, that so much of them as should not be sold by him in his Life-time, should after his Decease, go to and be vested in *Robert Kerr* his Son, and the Heirs Male of his Body, with Remainder to his Daughter the Respondent *Christian* and the Heirs Male of her Body, with other Remainders over.

4 June 1717. THE said *William Kerr*, sold and conveyed the said Lands of *Ormistoun*, for a valuable and full Consideration to *William Elliot Esq;* and his Heirs, and Livery of Seisin was duly given to the said *William Elliot*, and he and those claiming under him, have ever since been in the Possession thereof under the said Title.

1720. THE said *William Kerr* dyed, upon whose Death such Part of the said Estate included in the said Settlement, made by him in 1708 as was not sold in his Life-time, became vested in the Respondent *Christian* by Virtue of the said last mentioned Settlement, her Brother *Robert* having dyed in his Father's Life-time without Issue.

Action brought 1727. AFTER the Respondent *Christian* and her Ancestors, and those claiming under them, had by this Title been in the quiet Possession of the said Lands of *Ormistoun* and *Cuthbertshope* for so great a Number of Years, his Grace the Appellant (tho' disabled by the Deed of Entail to Claim under his Ancestor *Earl William* if he had incurred a Forfeiture) thought fit as Heir of Entail, to bring an Action of Reduction before the Court of Session in Scotland, against the Respondents and the said *William Elliot* since deceas'd, and afterwards reviv'd against Captain *William Elliot* his Son and Heir, — Thereby attempting to Impeach their respective Titles to the said Lands, and to have the several Deeds under which they claimed the same declared Void, or at least that the Equity of Redemption still subsisted, and that the Lands should belong to the Appellant, upon Payment of the Principal Sums and Interest that should be truly found due, after deducting and allowing the Rents and Meise Profits of the Estate that had been possessed by the said *Andrew Kerr* and his Heirs — And for that purpose Insisted

Objection I. THAT *Earl William* having only a limited Right to the Estate by Virtue of the said Deed of Entail, to Charge the same with the Payment of the Grantor's Debts, he had no Power to make a proper Wadsett, because by that Means he might have Wadsett or Mortgaged Lands of a considerable Value for a small Sum.

Answer. EARL *William*, had by the express Words of the Entail, a Power to Burthen the Estate with the Debts of *Earl Robert* the Entailer, and as he was not confined to any particular Form or Method of charging them, so he was at Liberty to Affect the Estate with any Sort of Mortgage or Burthen that the Forms of the Law allowed, and which the Creditors would accept of; and that of Proper Wadsetts was the most usual Method of granting Securities at that Time. And however Beneficial a Mortgage or Wadsett might be, the Earl or those claiming under him had a Liberty upon Payment of the Money to Redeem — And as the Heirs of Entail had a Power by the Settlement to Fee out (that is, to grant the Lands in Perpetuity to Persons to hold them immediately of the Grantor as their Over Lord) at the Rent the Estate then yielded, much more were they enabled by the Power reserved to them of Burthening the Estate with the Debts of the Entailer, to grant Proper Wadsetts which were redeemable Securities.

Objection II. THAT *Earl William*, having been by the Entail disabled from doing any Deed by which the Estate might be Appri- zed, Adjudged or evicted from him, could not lawfully grant the Bond of *Eik*, upon which the Reversion was Appri- zed as aforesaid, and therefore the Bond of *Eik* and Apprizing following on it was void.

Answer. IT was answered for the Respondents, That the Entail expressly gives Power to the succeeding Heirs of Entail to Burden or Charge the Estate with the Debts of the Grantor — Those Securities necessarily must contain an Obligation to pay, and that Obligation by the Force of the Law, must necessarily produce process of Apprizing Adjudication and other Methods for making their Demand effectual, &c. So that *Earl William*, did nothing with Respect to the charging the Estate with *Earl Robert's* Debts, but what he lawfully might do — And as *Earl William's* Act was not contrary to the Limitations of the Entail, it was prudent and highly beneficial to his Successors — It must be admitted that Process of Apprizing, might have gone upon every one of the Debts severally, which composed the Gross Sums contained in the Wadsetts or Bond of *Eik* — That each of those Apprizings might have affected the whole Estate, and with the accumulated Sums of Principal, Interest and Penalties (which upon an Apprizing are all made Principal and carry Interest) would become a Real Charge upon it, and if not redeem'd in ten Years, would carry the absolute Property of the Lands. — And therefore *Earl William*, to prevent Multitudes of expensive Suits, prudently contrived to draw as many of these Debts as he could into one Hand, and to satisfy the Creditor by granting a Wadsett pretty near equal in Value to the Debt owing; And to confine the Process of such Creditor to the Wadsett'd Lands only; and it was an Act of Friendship in the said *Andrew Kerr*, who was so large a Creditor, to accept of a Security in that Manner.

Objection III. THE Appellant next insisted that 5000 Marks, Part of the 27,500 Marks contained in the Bond of *Eik*, was the Proper Debt of *Earl William*, and not of *Harry Lord Kerr*, tho' therein recited as such. — For that tho' the Bond of *Eik* mentions a Bond of 5000 Marks granted by *Earl William* and *Chatto*, to *Sir William Scott* for Money that was applied to purchase two Bonds granted by *Harry Lord Kerr* to *Murray* and *Carnagy* to that amount, which were a Charge on the entailed Estate, yet in Reality that Bond of 5000 Marks, was granted for Money employed to no such Purpose, as might appear — 1st. From the Date of the Assignment of these two Bonds of *Lord Kerr's*, which is in 1644, eleven Years before the Date of the 5000 Marks Bond, so that the Money taken up on the last mentioned Bond could not have been employed in purchasing an Assignment of a Date so long prior. 2dly. From the Wadsett Right granted to *Scott of Langshaw* for 22,000 Marks, wherein mention is made of a Bond due by *Earl Robert* to *Sir William Scott* for 7000 Marks, which had been discharg'd by *Scott of Langshaw*, upon the Back of which Bond, there is an Indorsement (and as the Appellant says, in the Hand-writing of *Sir William Scott*) of the Tenor following, viz. 4 January, 1654. This Bond is satisfied to *Sir William Scott*, by retiring of his own Bond of 2000 Marks Restand by him to *Andrew Kerr* of *Chatto*, and receiving a new Bond of the *Earl of Roxburgh* and *Chatto*, of 5000 Marks payable at *Whitsunday* 1654. — Whence the Appellant concluded, That the 5000 Marks Bond having been given in Satisfaction tantum, of that of 7000 Marks, could not have been contracted to discharge the other Bonds of *Lord Kerr*.

And 3dly. The Appellant observed, That in a Competition between the Son of *Sir William Scott* (to whom the said Bond of 7000 Marks had been assigned) and the Executrix of the said *Sir William*, for the said 5000 Marks Bond, which the Son insisted fell under his Assignment, as having been Surrogat in place of the said 7000 Marks Bond, the Commissioners for Administration of Justice in Scotland under the Usurpation, Decreed accordingly in Favour of the Son: Whence it was concluded, The Money borrowed upon it could not have been applied to discharge *Lord Kerr's* Bonds.

Answer.

THE Respondent answer'd, *First*, The Date of the Assignment to Lord Kerr's Bonds can yield no Evidence at all, when they were purchased by the Respondent's Ancestors. — It was the known Custom of Scotland at that Time, and till altered by Statute in 1696, That Persons took Bonds as well as Assignments in *Blank*, as to the Name of the Creditor or Assignee, purely to save the Trouble of multiplying Conveyances, and then delivered them over to any one that purchased them; and by delivering them, transferred the Property, without any written Assignment at all; nor were they ever filled up, until the Possessor intended to make use of them, to demand his Money, or state an Account; and then he filled up his own Name in the *Blank*, which might be done at any Distance of Months or Years after the Date of the Bond or Assignment: And therefore, in the Case in Question, Lord Kerr's Bonds might have been originally assigned in *Blank*, in the Year 1644, and might have passed through Fifty different Hands, before the Year 1655. that they were purchased as aforesaid, and the Respondent's Ancestor filled up his own Name, and kept them to support the Transaction with Earl William, whose Security by it self was not sufficient. — And this being the Case, the Respondent further answered, That the Evidence which arose from the said Andrew Kerr's having Lord Kerr's Bonds in his Possession, and from the particular Recital of the Bond of Eik, at the Time the Affair was transacted, and when the Fact was recent — was not to be over-banced by any Argument from the Memorandum that appears on the Back of the 7000 Marks Bond *unsubscribed, of a Hand-Writing unknown and scarce legible*. And if it did appear to be the Hand-writing of Sir William Scott, it cannot be rely'd on as Proof of any Fact, since by the Writings it appears he did not assign over this Bond, until about a Year after the Date of this pretended Memorandum. — Besides, it is a very possible Case, that Sir William Scott might have been paid up his 7000 Marks Bond, in order to the finishing the Transaction with Langshaw, and at the very same Time, might have lent out 5000 Marks, part of that Money, on the joint Security of Earl William and Chatto, who borrow'd it to purchase Lord Kerr's Debts. And tho' this may have been the real Transaction, yet Sir William having no other Concern in it than what related to himself, might have entred the Memorandum aforesaid on the Back of the Bond (if that Note is of his Writing) — And the Judgment given between the Son and Executrix of Sir William Scott finding the 5000 Marks Bonds a *surrogatum*, in place of that for 7000 Marks, can be of no Influence. — The Respondent's Ancestor was no ways concerned which of the Parties prevailed: all he had to do was, to pay the Bond to such as were found to have the best Right, which he did accordingly. And the Respondents being now possessed of the 7000 Marks Bond, originally due by Earl Robert, and of the Bonds of Lord Kerr, which being Debts affecting the entailed Estate, could not possibly have been purchased but for the full Value; They insisted, That the Recital of the Bond of Eik, and of the original Wadsett, was sufficiently supported to substantiate a Settlement so antient, attended with continued Possession.

Objection IV.

THE Appellant insisted further, That the original Wadsett to Scott of Langshaw, could not subsist for the Sum of 15,000 Marks, due originally by Bond to Murray of Langbarmistoun, because that Sum was once paid by Earl William's own Money, and therefore could not have been reared up again as a Debt. And the Evidence for the Fact suggested was, A Declaration dated the 17th of February 1654, under the Hand of the said Earl William, to Mr. Don his Steward, signifying, That he was satisfied that Mr. Don had apply'd the Money therein mentioned to the Purchase of the Debt in Question, which was by Earl William's Direction assigned over to John Scott of Langshaw, And therefore discharging Mr. Don of that Money, tho' he had not the principal Bond or Assignment thereof to produce as the Vouchers of his Accounts, in regard he had delivered the same to the said John Scott, by his the said Earl's Direction, for grounding his Security of the Lands of Ormiston thereupon.

Answer.

TO this the Respondent answered, That Earl William's Declaration to any Man, were it explicit, could not hurt a Right made by him to another. But supposing it Probative, It yields no Evidence that can affect the present Question — The Creditors upon Earl Robert's Bonds pressed for Payment, Earl William who had no Money, and whose Credit was restrained by the Irritances in the Entail, had no other Recourse but to find some body that had Money, who would lend it upon the Security of the original Bond assigned: Accordingly he employ'd Mr. Don his Steward, who finding the said Scott of Langshaw ready to advance Money on those Terms, from him he borrowed the Sum that was paid to the original Creditor; And for Mr. Scott's Security, took Assignments, by the Earl's Order, directly in Mr. Scott's Name; which having been the Transaction, it was just he should have a Signification in Writing from the Earl, that he might not stand accountable for a Debt that was assigned over to another Person by his Order.

Interloquitor of the Lords of Session.

23 July 1731.

THE Cause having been heard before the Lord Cowper Ordinary, his Lordship reported the same to all the Lords; whereupon their Lordships, by their Interloquitor of the 23d of July 1731, FOUND, " That the aforesaid two Contracts of Wadsett and Bond of Eik, were lawful Transactions, and not inconsistent with the Tailzie, and REPELLED the Objection made by the Appellant against the 15,000 Marks Bond, due to Murray of Langbarmistoun, and assigned by him to Scott of Langshaw; and also REPELLED the Objection against the 5000 Marks Bond of Earl William and Kerr of Chatto, to Sir William Scott of Clackington, and FOUND the same was apply'd for purchasing two Debts of Harry Lord Kerr's, of the like Extent with which the Tailzied Estate was burthened. And FOUND the Bond of Corroboration and Eik, granted by Earl William for Debts due by Robert Earl of Roxburgh, Maker of the Tailzie, was a sufficient Ground of Apprising, whereof the Legal might run. *i. e.* That the absolute Property of the mortgaged Premises might become vested irredeemably in the Mortgagee, if the Principal, Interest and Costs were not paid within Ten Years after such Apprising obtained.

AGAINST the said Interloquitor of the Lords of Session, the Appellant has brought his Appeal, founding chiefly on the Objections before-stated.

BUT FORASMUCH as the Respondent Christian and her Ancestors, and those claiming under them, have been and continued in the quiet and uninterrupted Possession of the said Lands upwards of Seventy Years, under the Title before set forth; and as the Facts appear upon the Face of the Deeds to be fairly recited, and no ways disproved by the Appellant; And that the said Andrew Kerr, at the Request of the said Earl William, and for the Benefit of all the Remainder Men in the said Entail, laid out the full Value of the Lands for the Payment of the Debts of Earl Robert, the Maker of the Entail, and none of the Appellants Ancestors ever thought fit to call in Question any of the aforesaid Transactions, not the Appellant himself, till upwards of Thirty Years after he came into the Possession of the said Estate; And as the Appellant's Objections to these two Debts, which are part of the Consideration Money mentioned in the Deeds on which the Respondent's Title is founded, are only *Bare Assertions and Presumptions*, without being supported by any legal Evidence, and are made at so great a Distance of Time, and after the Death of all the Parties concerned therein, who might have fully cleared up any seeming Difficulties:

THE Respondents therefore humbly hope, That after so long an Acquiescence, they and the other Persons who are in Possession under divers antient Conveyances for valuable Considerations, shall not be dispossessed of the said Lands, nor the Respondents ordered to account with the Appellant for the Rents and Profits thereof, it being impossible for them so to do at this Distance of Time; The Respondent Christian or her Ancestors having never kept any Account of the Rents or Outgoings of the Estate, for that by the established Laws of Scotland the Property of the Lands became vested in them without Account, both by Virtue of the proper Wadsets, and by the Apprising obtained on the Bond of Eik: And that the said Interloquitor of the Lords of Session shall be affirmed, and the Appeal dismissed with Costs.

DUN. FORBES.
WILL. HAMILTON.

His Grace John Duke of } APPELLANT.
Roxburgh,

Christian Kerr Lady }
Chatto, and Charles } RESPONDENTS.
Ker, Esq; her Hus-
band.

The RESPONDENTS CASE.

To be heard at the Bar of the House of Lords
on *Wednesday* the 27th Day of *March* 1734.

27th March 1734.

*There not being proper Parties the Appell^t had liberty
to amend his Appeal on paying 20 for the costs of the Day.*